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# A Review of Existing Procedures for Resolution of Disputes Over a Union's Calculation of its Agency Service Fee

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Submitted to the Joint Standing Committee on Labor  
By the Maine Labor Relations Board  
Pursuant to Public Law c. 415, 2007.

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Board Members: Peter T. Dawson, Chair  
Karl Dornish, Jr., Employer Representative  
Carol B. Gilmore, Employee Representative

Executive Director: Marc P. Ayotte

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## EXECUTIVE SUMMARY

Public Law c. 415, 2007, directed the Maine Labor Relations Board to study the existing procedures for resolving disputes regarding the calculation of agency service fees and report back to the Joint Standing Committee on Labor with recommendations. Board staff researched the constitutional issues raised in these matters and solicited input from state employees and union officials who had participated in agency fee dispute proceedings in Maine. Board staff also reviewed the mechanisms adopted by other states regarding agency fee issues. The primary objective of this study was to assess whether bringing agency fee disputes to the Maine Labor Relations Board or the Board of Arbitration and Conciliation would be an improvement over using private arbitrators.

The bulk of the issues raised by state employees who were dissatisfied by arbitration of fee disputes through the American Arbitration Association (AAA) were issues that were a result of not being represented by an attorney and would have arisen regardless of the forum. Some of the issues of perceived bias were grounded in a misperception about how arbitrators are chosen in these types of proceedings and a feeling that AAA should have done more to help out *pro se* litigants. None of the specific issues raised to the Board by the fee challengers would have been resolved by having the dispute heard by a state agency.

In reviewing the experience in Maine so far with agency fee disputes and the experiences in other jurisdictions, the Board concluded that performing agency fee adjudication would have a very significant impact on the operations of the Board, as substantial professional staff time would be consumed by the process. This would affect the Board's ability to achieve its core mission at a time when the Board anticipates a significant increase in workload due to the K-12 reorganization enacted in 2007. Given that agency fee objectors always have the option of pursuing an action in federal court under 42 U.S.C. §1983, the Board concludes that the current system of using an impartial decision maker should remain intact.

## **INTRODUCTION**

A central element of collective bargaining in the U.S. is that the bargaining agent is the exclusive representative of the employees in the bargaining unit and must represent all of the employees in that unit, even those who are not union members. A constitutional question arises when the government requires public sector employees who are not union members to provide financial support to the union to help with the costs of negotiation and representation. In order to protect those employees' First Amendment interests in speech and association, any requirement to pay agency service fees in the public sector must be carefully tailored to minimize the infringement.

Public Law c. 415, 2007, amended Maine's laws to permit employers to deduct agency service fees from an employee's pay if doing so is required by the collective bargaining agreement, but prohibits the employer from disciplining or discharging an employee for failure to pay dues or agency fees. The law also directed the Maine Labor Relations Board to study the existing procedures for the resolution of disputes regarding the calculation of the agency fee amount and report back to the Joint Standing Committee on Labor with recommendations.

In undertaking this study, Board staff solicited input from state employees and union officials who had participated in agency fee dispute resolution processes in Maine. Board staff also researched the constitutional issues raised in these matters and the mechanisms adopted by other states regarding agency service fee issues. This research is summarized in this report and serves as the basis for the recommendations of the Board to the Joint Standing Committee on Labor.

The first part of this report summarizes the development of the law on agency fee issues and the current constitutional requirements. The second part reviews the concerns raised by the participants. The third part discusses additional factors that must be considered in evaluating the merits of using a different decision-making forum.

## **PART I: BACKGROUND ON THE LAW AND TYPICAL UNION PROCEDURE**

The constitutionality of compelled payment of agency service fees in the public sector came before the U.S. Supreme Court in 1977 in *Abood v. Detroit Board of Education*. 431 U.S. 209. The Supreme Court concluded that the public policy of fostering labor peace through the collective bargaining process applies equally in both the private and the public sectors and that unions have a legitimate interest in addressing the free-rider issue. *Abood*, 431 U.S. at 224. The Court also held that nonunion public sector employees have a constitutional right to prevent the union from using a part of their required service fee for political or ideological matters unrelated to the union's role as collective bargaining agent. By limiting mandatory "fair share" fees to financing the bargaining agent's activities in collective bargaining, contract administration, and grievance adjustment, the governmental interest of labor peace is furthered without significant infringement of First Amendment rights. *Abood*, 431 U.S. at 225.

In an Opinion of the Justices issued in 1979, the Justices of Maine's Supreme Judicial Court considered the constitutionality of fair share fees, reviewed *Abood*, and stated that "nothing in the Constitution of Maine requires a different conclusion." *Opinion of the Justices*, 401 A.2d 135, 146. The Maine Labor Relations Board has issued only two opinions addressing fair share fees, both in the early 1980's. The Board concluded that fair share fees were permitted by both the State and the Municipal Employee Labor Relations Laws and were a mandatory subject of bargaining. *Council 74, AFSCME v. City of Bangor*, MLRB No. 80-50 at 4 (Sept. 22, 1980), *rev'd on other grounds*, *City of Bangor v. Council 74, AFSCME*, CV-80-563 (Me. Super. Ct., Pen. Cty., June 11, 1981); *City of Bangor v. Bangor Fire Fighters Assoc.*, MLRB No. 83-06 at 19 (Aug. 2, 1983).

In 1986, the U.S. Supreme Court issued *Chicago Teachers Union v. Hudson*, in which it identified the minimum procedural safeguards a union must employ to protect

nonmembers' First Amendment interests. The *Hudson* Court held that,

the constitutional requirements for the Union's collection of agency fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending.

475 U.S. 292, 310 (1986).

With respect to the first item, the *Hudson* Court stated that the nonmember must "be given sufficient information to gauge the propriety of the union's fee", and reiterated that the union bears the burden of proving the amount of expenditures for collective bargaining and contract administration. *Hudson*, 475 U.S. at 306. Regarding the second item, the *Hudson* Court did not indicate what "reasonably prompt" means, but did state that "an expeditious arbitration might satisfy the requirement of a reasonably prompt decision by an impartial decisionmaker, so long as the arbitrator's selection did not represent the Union's unrestricted choice." *Hudson*, 475 U.S. at 308, n. 21. The escrow requirement ensures that those funds in dispute are not available to the union while the matter is being resolved. *Hudson*, 75 U.S. at 309.

The Supreme Court provided some guidance on what particular activities can be considered "chargeable" to agency fee payors the 1991 *Lehnert* decision. *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991). The three point test applied by the Court majority is that for an activity to be chargeable it must: 1) be "germane" to collective bargaining activities, 2) be justified by the government's vital policy interest in labor peace and avoiding "free riders" and 3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." *Lehnert*, 500 U.S. at 519.

As a final note, the Supreme Court has unequivocally stated that an arbitrator's decision would not bind a court if a challenger filed an action in federal court under 42

U.S.C. §1983. *Hudson*, at 308, n. 12. The judgment of an arbitrator or a state agency will not control the decision of a court on constitutional matters. The Supreme Court held more recently that an objecting employee who did not agree to submit the fee dispute to arbitration could not be required to exhaust the arbitral remedy before proceeding with a claim in federal court. *Air Line Pilots Assoc. v. Miller*, 523 U.S. 866 (1998).

The minimum constitutional safeguards established by the Supreme Court have been applied by state and federal courts over the years in a more or less uniform way. Consequently, most national unions have established procedures that meet the basic *Hudson* requirements. This process typically involves:

1. On a regular basis (usually each fiscal year), the union produces a financial report that breaks expenditures down into major categories of expenses, verified by an independent auditor.
2. The union then determines which expenses are chargeable to agency fee payers and which are nonchargeable expenses. The amount of the agency fee is then calculated.
3. Before the agency fee requirement is implemented, the union sends a notice to all nonmembers, which includes the financial information and the basis for the agency fee calculation and an explanation of how a nonmember can object to the calculation of the fee.
4. The union establishes a procedure for resolving disputes regarding the calculation of the fee and sets up an escrow account to hold disputed fees while challenges are resolved. Typically, an arbitrator is selected (not by the union) from the American Arbitration Association, the Federal Mediation and Conciliation Service, or a similar panel of neutrals. The union's procedure typically will establish a time frame within which a nonmember must submit his or her objection, how multiple challengers

will be heard in a consolidated case, how escrow procedures will work, and other procedural matters. The union must pay the full cost of such a dispute resolution mechanism and bears the burden of proving the validity of the agency fee amount.

## **PART II: DISCUSSION OF COMMENTS FROM FEE CHALLENGERS**

The 2003-2005 collective bargaining agreements between the Executive Branch of State government and MSEA and AFSCME were the first to impose a mandatory service fee upon non-member bargaining unit employees; however, the fee was applied only prospectively and employees hired prior to the imposition of the fee were “grandfathered” from coverage. In the successor collective bargaining agreements, covering the period from 2005-2007, the parties agreed that payment of the service fee would be a condition of continued employment for all non-member unit employees, regardless of when they were hired. That requirement was continued in the parties’ 2007-2009 agreements.

In July, 2005, the MSEA sent *Hudson* notices to all employees included in the Executive Branch bargaining units it represents. The notice included a detailed explanation of chargeable and non-chargeable categories, an audited statement of the exact dollar amount spent in each category, a copy of the independent auditor’s report, and a notice of the right to challenge the amount of the service fee by August 16, 2005. Thirty-five non-member unit employees filed challenges, an arbitrator was appointed by the American Arbitration Association, three days of hearing were held. The arbitrator issued a decision on May 4, 2006, holding that the union had sustained its burden of establishing that the fee assessed reflected the per capita share of chargeable costs, as defined by applicable law.

A similar process was followed regarding the union’s 2006-07 and 2007-08 service fee assessments. On June 27, 2006, the union issued a Hudson notice, eight-six

unit employees filed challenges, an arbitrator was appointed and hearings were held between January and July, 2007. A decision was pending on September 19, 2007, when Board staff met with some of the fee objectors and challengers. For 2007-08, the Hudson notice was issued on June 22, 2007, forty-two persons filed challenges, an arbitrator was appointed, and hearings commenced in February, 2008.

The comments discussed in this section were offered by employees who had participated in the fee challenge procedure, as well as from at least one person who objected to payment of the fee but had not formally challenged the fee amount. These comments were submitted to the MLRB's Executive Director via letters and e-mail in response to a request for comments. These issues were also discussed during an open meeting held with MLRB staff on September 19, 2007.

#### **A. Concerns Regarding the Selection and Use of AAA Arbitrators**

The provision in the four current collective bargaining agreements between the Executive Branch and MSEA which creates the service fee obligation is Article 65. The dispute resolution section of that article states as follows:

##### **7. Disputes**

The amount of the service fee shall be subject to review pursuant to the American Arbitration Association's Rules for Impartial Determination of Union Fees. Pending resolution of any such dispute, the disputed amount of fees shall be placed in an interest-bearing escrow account. MSEA-SEIU shall pay for any maintenance fees associated with such escrow accounts. The State shall not be liable for any fees, costs, damages, expenses, or any other form of liability involved with regard to such escrow accounts.

MSEA-SEIU is solely responsible for payment of the fee charged by AAA for the cost of providing necessary administrative services. The arbitrator will be compensated by MSEA-SEIU, in accordance with the per-diem rate currently on file for that arbitrator with the AAA, and shall be reimbursed for expenses by MSEA-SEIU. Attorneys' fees, witness fees, and other expenses shall be borne by the respective parties. No fees, costs,

damages, expenses, or other form of liability involved with regard to arbitration shall be borne by the State.

In the event a dispute under this Article is submitted to arbitration, the arbitrator shall have no power or authority to order the State to pay such service fee on behalf of any employee.

In the event a change in law requires that this type of dispute be resolved in a forum other than an arbitration under the auspices of the American Arbitration Association, the dispute resolution procedure will comply with law. All portions of this Article that are unaffected by the change in forum will remain in full force and effect.

The fee challengers have expressed several concerns regarding the assignment of fee dispute arbitrators through the American Arbitration Association (referred to as "AAA"). A number of the comments received by the Board suggested that the AAA as an organization was biased. One fee objector asserted that there is no chance for an impartial fee dispute arbitration process as long as the AAA is the only source of arbitrators. The challengers pointed out that the AAA Board of Directors included 13 union officials or union lawyers. The challengers thought this union block could potentially dominate the governance of the organization. The MLRB does not see such a risk, as the AAA Board in 2006 consisted of 100 persons, including management lawyers, corporate officers, and academics, in addition to union-affiliated individuals.

Part of the fee challengers' dissatisfaction is based on the fact that they had no input in the selection of the arbitrator that would hear and decide the fee challenge dispute. The selection process in agency fee dispute cases is different than the process used in grievance cases. The standard procedure in grievance cases is that, if the parties have not agreed on an arbitrator, AAA prepares a list of names from their panel of labor arbitrators and then each party strikes any name to which it objects and numbers the remaining names in order of preference. AAA then appoints an arbitrator from among the persons who have been approved by both sides. In contrast, in agency fee disputes, AAA appoints an arbitrator without any prior input from the union or the challengers,

although there is an opportunity to object for cause after the appointment. The comments received by the Board regarding the selection process suggest that some of the objectors were dissatisfied with the process due to a misperception that the union had selected the arbitrator.

The rationale for the selection process in agency fee disputes became clear in the Board staff's discussion with the objectors who attended the September 19 meeting. The challengers come from all parts of the state and the group is diverse as to grounds for challenge--from philosophical objectors opposed to any payment, to those who are willing to pay but question the basis for the fee being imposed. Getting them to agree on selecting a particular arbitrator would be extremely time consuming, if not impossible. While at least some of the challengers have been represented by counsel in the arbitration process, others have not, and there is no reasonable way to get them to speak through one voice as a group. Having AAA make the selection allows the process to start much more quickly. An analogous situation under Maine law authorizes the AAA to select a neutral arbitrator for purposes of interest arbitration if the parties are unable to do so.<sup>26</sup> M.R.S.A. § 965(4)(¶ 3).

Another objection received is that many of the arbitrators have had long histories of working as arbitrators in disputes involving MSEA. Consequently, the feeling is that these arbitrators have a significant bias and the outcome will be shaped by a desire to maintain their prospects for future work with MSEA on grievance or interest arbitration cases. The AAA rules permit any party to object to the arbitrator selected in a fee dispute case as soon as the appointment is made. When the bargaining agent notifies AAA of the agency fee dispute, it provides AAA with a list of the names and addresses of the fee challengers. AAA then selects an arbitrator from among those experienced labor arbitrators who have agreed to be available to do this type of work, notifies all of the parties of the name of the arbitrator, and provides them the arbitrator's résumé. Rule 4 of

the AAA fee dispute arbitration rules states that, “[a]fter the parties in the procedure are notified of an appointment, they may challenge an arbitrator for cause by notifying the AAA of their objection” and the AAA may disqualify an arbitrator.

It appears that the basis for at least some of the concerns discussed above comes from a publication of the National Right to Work Legal Defense Foundation titled, The American Arbitration Association: Preserving Big Labor’s Forced-Unionism Agenda by Undermining Supreme Court Doctrine, a copy of which was supplied to the Board by one of the challengers. The National Right to Work Foundation has been a leader in opposing the mandatory payment of union service fees for many years. Despite the fact that the Foundation-supplied attorneys have been involved in numerous legal challenges to agency fees over the years, the Foundation does not cite any federal or state court holding that the arbitral process failed to meet the constitutional requirement of an “impartial decisionmaker” merely because an arbitrator had been selected by the AAA pursuant to their Rules for Impartial Determination of Union Fees. The Board’s research also failed to produce any court decision.

AAA’s rules provide that the arbitrator will be selected from a special panel of arbitrators experienced in labor relations who are willing to work on fee dispute cases and are prepared to meet the applicable time limits. Evaluating the bargaining agent’s chargeability determinations requires expertise in the collective bargaining process, particularly for those expenses whose chargeability is not clearly established through existing precedent. The decision-maker must know generally how unions operate, and must understand the nature and scope of their statutory representational duties and responsibilities in order to review the status of contested expenditures. It is this Board’s understanding that the overwhelming majority of experienced labor arbitrators who work in Maine (and in New England) are members of the Labor Arbitration Panel of the AAA.

Excluding arbitrators merely because of their affiliation with AAA would effectively preclude from consideration those experienced neutrals who could best do the work.

Having either the BAC or the MLRB hear and decide service fee disputes would not address the fee challengers' concerns regarding their lack of input in the selection of the decision-maker. Both the BAC and the MLRB are comprised of a neutral chair, an employee representative and an employer representative and two alternates for each primary member. Both boards function as tri-partite panels consisting of one person from each member category. Traditionally, members and alternates all serve on panels on an informal rotation and based on their respective availability; however, the primary members usually sit on particularly important cases. The only input parties have regarding the members serving on a particular case is the right to challenge individual members for cause, as is currently the case with the fee dispute arbitrator appointed by AAA. Furthermore, some of the same perceived issues would arise if the BAC were to decide fee dispute cases since two of the three neutral chairs who currently serve on the BAC also offer dispute resolution services privately and accept labor arbitration work.

## **B. Concerns Regarding Discovery and Other Pre-hearing Issues**

### **1. Challengers' Discovery Issues**

Fee challengers who have been very involved in the fee dispute arbitration process outlined a number of concerns regarding the process through which they and others gained access to the bargaining agent's records while preparing their cases for arbitration. Before addressing these concerns, it will be helpful to describe briefly the discovery process in courts, in arbitration, and with the MLRB.

In trial practice before the courts, the rules of civil procedure provide a structured avenue for each party to obtain facts and information from the other party about the basis of the dispute. This information-gathering process is called discovery and it includes

interrogatories, depositions, requests for production of documents and other evidence. The purpose of discovery is to simplify the matters in dispute and assist the parties in preparing for trial. The Maine Rules of Civil Procedure have 12 separate rules regarding the discovery process.

In the typical grievance arbitration case where the dispute turns on the interpretation and application of the collective bargaining agreement, there is generally no right or necessity for discovery. The parties have attempted to resolve their dispute through at least one or two levels of the grievance procedure prior to arbitration and have learned the bases of their respective positions that way. Furthermore, under the general principles of collective bargaining law, the employer is obligated to provide the union with the information necessary to process grievances.

The AAA service fee dispute resolution rules discuss evidence and the production of evidence in the following 2 rules:

#### 14. Evidence

The parties may offer such evidence as they desire and shall produce such additional evidence as the arbitrator may deem necessary to an understanding and determination of the dispute. The arbitrator shall be the judge of the relevance and materiality of the evidence offered and conformity to legal rules of evidence shall not be necessary.

#### 15. Evidence by Affidavit and Filing of Documents

The arbitrator may receive and consider the evidence of witnesses by affidavit, giving it only such weight as seems proper after consideration of any objection made to its admission. Parties shall be afforded an opportunity to examine all documents submitted in the proceedings. Documents not filed with the arbitrator at the hearing, but which are arranged to be submitted later, shall be filed with the AAA for transmission to the arbitrator.

It is important to remember that the union bears the burden of proving that the service fee is based on only those activities that can be legitimately charged to objecting nonmembers.

As the AAA rule cited above indicates, it is up to the arbitrator to decide whether to require a party to produce a requested document. Over the course of three successive agency service fee proceedings involving MSEA and the challengers, an approach to pre-hearing discovery has evolved.

In the first round of service fee dispute arbitration in 2005, no pre-hearing procedures were in place, resulting in eleventh-hour, piecemeal requests by the fee challengers for volumes of information. As the parties gained experience with the process, they sought the establishment of discovery, through pre-hearing procedural motions presented to the arbitrator. The pre-hearing procedural order for the 2006 case set forth a process through which fee challengers identified in writing the documents sought to be reviewed; set deadlines for the receipt of such requests; established three specific work weeks when up to three challengers at a time could examine and copy the documents sought; set a deadline for the union to identify its likely witnesses and a deadline for the challengers to identify any union staff member that they wished to call as a witness; and provided a mechanism through which the union's refusal to give any challenger access to any requested information would be reviewed by the arbitrator at the hearing.

More substantively, two challengers stated that the union had refused their requests to inspect the daily planners of union employees. Paragraph 2 of the procedural rules adopted by the arbitrator in the 2006 proceeding stated:

In response to requests for information that can be obtained from existing documents, or requests for specific existing documents, MSEA-SEIU will provide access to the documents containing the information, or

to the specified documents, at our offices at 65 State Street Augusta, Maine, provided that the requested information or identified documents are relevant to the issues presented in this arbitration.

In any system of impartial dispute resolution, neither party has an absolute right to demand the production of documents or to refuse such production. Rule 14 of the AAA service fee arbitration rules quoted above provides the challengers with the opportunity to raise the union's refusal to allow inspection of the employee planners with the arbitrator. The arbitrator would require the production of evidence if the arbitrator considered it "necessary to an understanding and determination of the dispute." It is not clear that the challengers pursued this option.

Some of the other concerns raised by the challengers regarding the discovery process centered on the difficulties faced in trying to review the relevant documents at the offices of MSEA, particularly for those who live and work a significant distance from Augusta. One challenger also asserted that the union should be required to pay for the copies of documents that the challengers actually introduced at the arbitration proceeding. There is nothing unique about AAA that creates these particular issues; they arise in any dispute resolution system.

Having either the MLRB or the BAC hear and decide fee disputes would not substantially address the fee challengers' concerns regarding pre-hearing discovery. Neither the MLRB nor the BAC provides the full scope of discovery available in the courts. The MLRB's prohibited practice complaint process includes a formal pre-hearing conference where each party is required to identify and provide copies of all documents the party intends to offer at the hearing. No additional documents may be presented into evidence, unless they were not available to the party seeking to offer them at the pre-hearing conference or they were not known to exist at that time. The chair of the BAC

assigned on a case can convene a pre-hearing conference on disputed discovery questions; however, this rarely occurs.

Pre-hearing discovery before both panels essentially consists of the subpoena process. If a party learns that the other party has documents believed to be relevant and important to the determination of the issue in dispute and if the other party is unwilling to produce the documents voluntarily, the party seeking access requests issuance of a subpoena by the panel chair. Typically, the subpoena is issued and is returnable at the pre-hearing conference.

If a party objects to production of the witness or documents that are the subject of the subpoena, the party files an objection with the executive director, setting forth the legal and factual reasons why the subpoena should be quashed. The parties present their respective arguments regarding the merits of the motion at the pre-hearing conference. Usually, the issue is decided by the Board Chair at the pre-hearing conference, but sometimes it is presented to the full panel. As a general rule, decisions are based on relevance, availability of alternative sources of the information sought, and respect for rules of privilege and the privacy interests of individuals.

## **2. The Fee Challengers' Difficulty in Coordinating Their Efforts**

A concern expressed by a couple of challengers was that they had had difficulty communicating with and coordinating their appeal with that of the other challengers. At the outset of the process, the bargaining agent forwards the names and addresses of the challengers to the AAA. The AAA sends each fee challenger a packet that includes the names and addresses of the other challengers. From that point, the nature and extent of interaction among the challengers is up to each individual. One challenger opined that home telephone numbers and e-mail addresses should also have been provided; however, the bargaining agent may not have access to such information. In addition, some might view such information as private, and not for distribution.

Utilizing the contact information provided by the AAA, the challengers are free to communicate with each other by mail and to coordinate their activities by use of e-mail or through meetings. Information provided by challengers to the Board indicates that they have done so. While coordination among the challengers would be helpful to them and contribute to the efficiency of the process, the challengers and the bargaining agent have described the arbitration as being comprised of separate cases, one for each individual challenger, which have been consolidated for purposes of hearing and decision. Each challenger has the right to present evidence, to examine and cross-examine witnesses, and to present argument. This approach of consolidating each litigant's separate case with those of similarly situated parties for purposes of hearing and decision is the same process the MLRB or the BAC would use.

### **3. The Denial of Administrative Leave**

A number of challengers noted that they are required to conduct discovery and attend arbitration hearings during the normal work day and that works a hardship on them. During the first round of the challenge process, the employer gave the challengers paid administrative leave for time spent attending arbitration hearings; but that has not occurred in either the 2006 or the 2007 rounds of fee arbitration proceedings.

The position of the challengers was that, since the State created the service fee obligation through their agreement with the bargaining agent and because the objectors' interests at stake are First Amendment rights, the employer should be legally obligated to provide administrative leave to those actually attending the arbitration hearing. Under the American system of justice, including practice before the courts, before administrative agencies, or in arbitration, each party bears the cost of preparing and presenting their respective cases; hence, this concern is inherent in our dispute resolution processes, and is not unique to AAA.

## C. Concerns Regarding the Hearing Process

### 1. Understanding the Legal Standard for Determining Chargeability

Fee challengers presented concerns regarding the nature of the evidence required to substantiate the amount of the service fee as well as questions regarding whether particular items are chargeable. One challenger contended that there did not appear to be any controlling standards regarding chargeability determinations. Subsequent to the Supreme Court's decision in *Abood*, many federal courts have issued decisions regarding the chargeability of particular types of expenditures - that is, whether they can lawfully be included in the service fee charged to non-members. While such decisions are not consistent on all issues, many issues have been settled and are no longer in dispute. It is difficult, especially for a *pro se* litigant, to digest the myriad of court decisions on these issues and form a coherent and articulable understanding of what is chargeable.

For those topics whose chargeability has not been conclusively established, the Supreme Court has provided some general guidance for making the determination. In *Lehnert v. Ferris Faculty Association*, a majority of the Justices endorsed the following three-part test: chargeable activities must be germane to collective bargaining, they must be warranted by the governmental interest in promoting labor peace and avoiding "free riders," and they must not significantly add to the burden on free speech that is inherent in allowing an agency fee at all. *Lehnert*, 500 U.S. 507, 519 (1991). The *Lehnert* Court went on to define "germane" expenditures as those which are "substantively" related to collective bargaining and "for services that may ultimately inure to the benefit of the members of the local union by virtue of their membership in the parent organization." *Lehnert*, 500 U.S. at 524.

In some respects, the *Lehnert* decision is not very helpful because there was no majority opinion on certain key issues and there were different majorities on different subjects. It is possible that greater clarity will be forthcoming as the Supreme Court is

poised to address the chargeability issue for the first time since *Lehnert* was decided in 1991. In a case involving a group of Maine state employees challenging the agency fee amount set by MSEA, the 1<sup>st</sup> Circuit Court of Appeals held that costs of litigation occurring outside of the bargaining unit were chargeable if the litigation satisfies the germaneness test described in *Lehnert* that applies to other pooled resources. *Locke v. Karass*, 498 F.3d 49, 66 (1st Cir. Aug. 8, 2007). There is inconsistency among the Circuit Courts on this particular issue. The Supreme Court granted the petitions for writ of certiorari in mid-February of 2008, but it will not be argued until the Supreme Court term beginning in October of 2008.

Judicial precedent controlling the chargeability of a specific activity, or the above standards in cases where there is no such precedent, must be applied by the decision-maker in fee disputes, whether that be an arbitrator, a judge or an administrative agency. In addition, the challengers always have the right to litigate the union's fee calculation in a federal-court action, regardless of whether the challenger has gone to arbitration. *Air Line Pilots Association v. Miller*, 523 U.S. 866 (1998). Thus, the difficulty in navigating this confusing legal field will be the same regardless of the forum used.

## **2. Evidentiary Issues in Agency Fee Dispute Resolution Processes**

Some of the challengers were dissatisfied with the process because they felt the arbitrator should have required more detailed evidence from the union. There are two stages at which the Union must provide financial information regarding the agency fee amount: in the notice sent to nonmembers and later in proving to the arbitrator that the fee is based on chargeable expenses. The Supreme Court has repeatedly held that, although the nonunion employee has the burden of raising an objection to the amount of the service fee, the union has the burden of proof regarding the issue. *Abood*, 431 U.S. at 239-240; *Hudson*, 475 U.S. at 306. *Hudson* requires that the notice contain sufficient information to allow a non-member to decide whether to object to the calculation of the

service fee amount. If a challenge is filed, the union must prove that the fee will only fund constitutionally permissible activities.

In *Hudson*, the Supreme Court described in a footnote the type and level of information that is constitutionally required to be given to non-members to enable them to decide whether to object to the amount of the service fee. The Court stated:

We continue to recognize that there are practical reasons why “[a]bsolute precision” in the calculation of the charge to nonmembers cannot be “expected or required.” [*Railway Clerks v. J. Allen*, 373 U.S., at 122, quoted in *Abood*, 431 U.S., at 239-240, n. 40. Thus, for instance, the Union cannot be faulted for calculating its fee on the basis of its expenses during the preceding year. The Union need not provide nonmembers with an exhaustive and detailed list of all its expenditures, but adequate disclosure surely would include the major categories of expenses, as well as verification by an independent auditor. With respect to an item such as the Union’s payment of \$2,167,000 to its affiliated state and national labor organizations, see n. 4, *supra*, for instance, either a showing that none of it was used to subsidize activities for which nonmembers may not be charged, or an explanation of the share that was so used was surely required.

*Hudson*, 475 U.S. at 307, n. 18. There is a difference of opinion among the Federal Courts of Appeals as to whether this reference in the footnote to “verification by an independent auditor” means that a CPA-conducted audit is required. Providing one, as MSEA has done, meets the higher standard among those courts. It should be noted that Certified Public Accountants are licensed and regulated by the State of Maine and, by producing and subscribing to an audit report, the auditors not only place the firm’s reputation but also their State licensure on the line.

At the hearing, the union must produce documentary and testimonial evidence to support the figures used to calculate the agency fee amount. “Absolute precision” is not required in the calculation of the fee. *Hudson*, 475 U.S. at 307, n. 18, *citing Railway Clerks v. Allen*, 373 U.S. 113, 122 (1963). MSEA, as unions typically do, offered the testimony of its CPA, its Chief Financial Officer, and various union officials and

personnel on the fee calculation process. The union offered contemporaneous records from its time and accounting system to corroborate its calculation. If the challengers disagree with the testimony of any witness presented by the union, they have the opportunity to challenge the witness on cross-examination or to present witnesses of their own to rebut that testimony. The challengers may disagree with the conclusions of the auditor and decide that offering their own expert witness is called for. The challengers may present evidence or elicit testimony regarding the facts or circumstances of particular expenditures in order to rebut the union's assertion that the expense is chargeable. The evidence presented by the challengers will be considered by the arbitrator in determining whether the union has met its burden of proof. The Union's burden is to establish the amount of the fee through relevant evidence, while the challengers' role is to call the evidence into question. Those roles are the same regardless of the forum.

### **3. Concern Regarding an Effective Subpoena Power in Arbitration**

One concern raised by the challengers arose because a union employee subpoenaed by the challengers failed to show up to testify at the arbitration hearing. The challenger asserted that there was no effective means for securing the attendance of witnesses at the arbitration proceeding. In that instance, a challenger wanted to question a certain union employee who had been convicted of theft 15 years earlier to inquire whether the individual handled union funds. The arbitrator issued a subpoena for the individual's attendance at the arbitration; however, the person failed to attend and, as described by the challenger "nothing happened." The arbitrator noted in his decision that the fee challengers made no request for additional hearing time to allow them to enforce the subpoena. Earlier in his decision, the arbitrator had stated that the questioning of the witnesses was done by various fee challengers. Thus, it appears that the fee challengers

were not assisted by counsel during the hearing. Evidently, the fee challengers were not aware of the option to seek enforcement of the subpoena in court.

Neither the Board of Arbitration and Conciliation or the Maine Labor Relations Board enforces their own subpoenas. Both panels have the statutory authority to issue subpoenas requiring persons to attend hearings and to bring relevant documents. In practice, both boards differentiate between subpoenas issued at the request of a party and those issued on the board's own initiative, the latter of which has not occurred within the last 15 years. No subpoenaed witness has failed to appear before either board in the last 25 years. If a subpoenaed witness failed to appear before the BAC or the MLRB, the party on whose behalf the subpoena had been issued would have the option of requesting that the hearing be adjourned to permit that party the opportunity to secure enforcement of the subpoena by a court, pursuant to the Maine Uniform Arbitration Act (14 M.R.S.A. § 5933(1)) or the Maine Administrative Procedure Act (5 M.R.S.A. § 9060), respectively. In the event that the subpoena had been issued on the initiative of either board, the applicable statutes authorize the board to seek enforcement of the subpoena by the court. In light of this, it is doubtful that the challengers would gain anything with respect to enforcement of subpoenas if the fee dispute hearing were held by the BAC or the MLRB rather than an arbitrator.

### **PART III: ADDITIONAL CONSIDERATIONS**

#### **A. Many of the Comments Received Reflect the Challengers' *Pro Se* Status**

Many of the concerns expressed by the challengers are typical of those expressed by *pro se* litigants in proceedings with the Maine Labor Relations Board and with similar quasi-judicial administrative agencies.

One challenger stated that the AAA case manager was hard to reach and refused to answer even simple procedural questions. Among the questions the challengers had were: what to expect at the hearing, how is evidence presented, how many copies of

exhibits must be provided, and whether briefs are required. The challenger claimed that, essentially, AAA was unwilling to provide procedural guidance to *pro se* litigants. In evaluating the information disseminated by AAA staff in this context, one must keep in mind that the arbitrator determines the specific procedures in each case. As the administrative staff for the organization, the AAA case manager may very well not know the details of the individual arbitrator's case-processing orders. The same challenger who voiced the concern regarding the accessibility of the AAA case manager has also frequently contacted the MLRB concerning the current fee arbitration process. This person, like most *pro se* litigants and others unfamiliar with legal practice, has had difficulty differentiating between procedural questions (how to do something) and questions seeking substantive legal advice.

In the MLRB's experience, the procedural and substantive difficulties with the discovery process voiced by the fee challengers are those typically encountered by *pro se* litigants. Although practice before the MLRB as well as in arbitration involves fewer procedural and evidentiary rules than the courts, parties represented by experienced counsel have an advantage. Counsel generally know the rules, understand the legal basis for the rules, are experienced in agency practice and procedures, and utilize this expertise to the advantage of the party they represent. Much of the frustration with the process expressed by the challengers may abate as they become more experienced with it. For example, in the first round of service fee arbitration the challengers were totally unfamiliar with the process and there was no organized pre-hearing discovery. In later rounds, building on their experience, the challengers have been able to file comprehensive procedural motions and detailed requests for the production of documents.

**B. The MLRB May Have Authority Over the Implementation of Agency Fees but the Board Has No Expertise in Deciding Constitutional Questions.**

While the MLRB has not issued a decision on this point, it is likely that the Board would consider the failure of a union to comply with the requirements of *Hudson* to be a violation of the collective bargaining law insofar as it constitutes interference with an employee's right not to join or participate in union activities. Consequently, although the Board would not get into an analysis of whether the fee amount was based only on chargeable expenses, the Board would consider whether the notice was sufficient, and whether the union established adequate procedures for escrow and for resolving challenges to the fee amount. Thus, the Board appears to have authority to oversee the process of implementing agency service fees pursuant to the Board's prohibited practice complaint jurisdiction.

The MLRB has the statutory authority to enforce the collective bargaining laws that grant specific rights to public employees and public employers. The MLRB does not have any authority, express or implied, to use its enforcement authority to protect First Amendment rights. As the agency charged with enforcing the collective bargaining statutes, a court will accord the Board's decisions substantial deference in recognition of the Board's expertise and experience administering the labor relations statutes. In disputes over the amount of service fees chargeable to non-union members, the challengers' First Amendment rights are at issue, and the Board has no special expertise deciding this type of dispute. Furthermore, if a federal court is presented with a fee dispute case presented as a violation of 42 U.S.C. § 1983, the court would hear the matter de novo and decide it as charged, regardless of the disposition of the issue at a state agency or at arbitration. Thus, having the MLRB or the BAC decide agency fee disputes would offer no legal advantage.

## **CONCLUSIONS AND RECOMMENDATION**

It is not *impossible* for the Maine Labor Relations Board to hear and decide disputes regarding the amount of union service fees lawfully charged to non-members, but it would not be possible to do so with current staff without affecting the Board's ability to achieve its core mission. A few other states have opted to authorize a labor relations agency to do agency fee dispute work, although no state has taken on this responsibility since the mid 1980's. Many of the state agencies that adjudicate agency fee disputes have a different organization or statutory authority than the MLRB. For example, some are directly involved in resolving contractual disputes and some regulate aspects of the unions' internal operations. (See Appendix.)

This review of the current fee dispute arbitration process has established no compelling rationale to change the current system. Several of the concerns expressed by the fee challengers are typical observations from *pro se* litigants, reflecting issues that are inherent in any system of dispute resolution. These concerns would not be addressed by having the MLRB or the BAC set the amount of the service fee.

Furthermore, since fee challengers' First Amendment speech and associational rights are involved, they may contest the bargaining agent's collection of mandatory fees in the federal courts pursuant to 42 U.S.C. § 1983. With respect to disputes about the process of implementing agency service fees, the challengers would likely be able to file a prohibited practice complaint with the Board under current law.

In conclusion, the Maine Labor Relations Board recommends that the current mechanism remain intact.

## APPENDIX

### AGENCY FEE DISPUTE MECHANISMS IN OTHER STATES

The following is a summary of how various states regulate major issues related to agency fee provisions. The three areas reviewed are:

- whether the state labor relations board is involved with the process for authorizing or de-authorizing agency fee provisions;
- whether the state board enforces any statutory provisions regarding the notice a union must give regarding the agency fee;
- whether the state board performs the role of the “impartial decision maker” regarding disputes on the amount of the agency fee.

This is not intended to be an exhaustive review of how all states deal with these issues but more of an illustration of the variety of approaches taken. The statutes of twenty-three states were reviewed for mention of agency fee issues and agency regulations and case law were considered to the extent available on line.<sup>1</sup> Some agencies were contacted directly for further information.

#### **1. Authorization Required for Agency Fees**

There is no constitutional requirement that a state enact legislation in order to authorize agency fee agreements or to protect the First Amendment rights of public sector employees subject to such agreements. Nonetheless, many states have adopted statutes to address the issues raised by agency fee provisions or to highlight the constitutional requirements. The approaches taken vary from state to state in very significant respects.

Maine’s statutes do not directly require the payment of a service fee, but allow the public employer and the bargaining agent to agree to such a requirement and a

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<sup>1</sup> None of the 22 states identified as “right to work” states by the National Right to Work Legal Defense Foundation website were reviewed. Of the remaining states, five (Kentucky, Colorado, Missouri, Indiana and West Virginia) were not reviewed because of very limited or non-existent collective bargaining rights in the public sector.

*Hudson* requirements is interference with an employee's right to refrain from participating in union activities.

Regardless of the level of detail provided in the state's statutes, they are interpreted in a manner that makes them consistent with the First Amendment requirements articulated in *Hudson*. If a state does regulate this area, the state will often set minimum time periods in which a nonmember can review the contents of the notice before having to object to paying the full amount or challenge the fee. Similarly, a state's statute might provide more detail about the contents of the notice than *Hudson* suggests and may touch on any of the following areas:

**Definition of Agency Fee.** While the issue of what expenses can be considered chargeable is a constitutional question, how a statute defines agency fee has an impact on what steps a nonmember must take to exercise their First Amendment rights. In a few states, "agency fee" means dues less the costs of benefits available only to members. Nonmembers are notified that they must pay the agency fee but they can "object" to paying that portion of the fee that goes to non-chargeable expenses. An "objector" may also "challenge" the calculation of the non-chargeable expenses.<sup>2</sup> A simpler approach limits the agency fee amount to only chargeable expenses, as in Maine's statute.

**Timing of Notice.** *Hudson* requires the union to provide a notice to nonmembers of the fee amount and to have a procedure for resolving disputes about the fee amount. There are a number of timing issues, some of which depend upon the definition of agency fee used in the statute. The first is the time that must elapse after the *Hudson* notice is issued and before the first payroll deduction is allowed. This varies from 14 days

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<sup>2</sup>This is comparable to the system in *Hudson*: nonmembers are notified of the amount owed by nonmembers, the portion of that amount that is due from those who object to paying for political or ideological expenditures. Those nonmembers who object within the required time frame will only have pay that proportion that is chargeable. In addition, objectors must be given an opportunity to challenge the calculation of that amount. The *Hudson* Court noted that the nonmember has the obligation to object, and the union has the burden of proving the validity of the calculation.

(Illinois) to 45 days (Pennsylvania). A 30-day period seems to be common (New Jersey, California, Minnesota). There is also the time within which a nonmember must object to paying the full amount, which, as noted above, is not applicable if the amount owed by all nonmembers is limited to the chargeable expenses. Finally, there is the time within which the nonmember must challenge the calculation of the agency fee. Oftentimes, the statute sets a minimum time frame within which the non-member must challenge the calculation of the fee--30 days is common. When the state statute specifies any of these time periods, the state is imposing a policy choice not specifically required by *Hudson*.

**Manner of Notice.** Some states specify in either statute or regulations that written notice be mailed to the home address of all employees obligated to pay the agency fee (Minnesota) while other states' only requirement is that the notice be written (California). Illinois regulations require the employer to provide access to bulletin boards for this notice. The most common approach is for states to leave open the issue of how nonmembers are to be notified. (New Jersey, Wisconsin, Delaware, Massachusetts.)

**Contents of Notice.** *Hudson* requires the notice to contain sufficient information about the union's expenditures to permit a nonmember to decide whether to challenge the calculation of the fee. Consequently, this information must be provided regardless of the requirements of the statute. Many states that address the content of the notice describe or reiterate the *Hudson* requirement in their statute or expand on it by providing greater detail. Such detail often covers the type of financial statements, the extent or manner of verification of expenditures required, instructions on how to object or challenge the fee, and sometimes a description of the escrow procedures. Massachusetts even requires the union to include with the notice a complete copy of the labor board's rules on agency fee disputes.

**Escrow.** *Hudson* also requires that the portion of agency fees that are "reasonably in dispute" must be placed in an escrow account pending the completion of the required process to challenge the calculation of the fee before an impartial decisionmaker. Without the escrow protection, the nonmember would essentially be loaning the money

to the union while the fee dispute was decided. Again, while escrow accounts are required by *Hudson* and thus need not be addressed in statute, states that legislate specifics regarding the notice are likely to also require escrow accounts in the statute. Some state labor boards set up escrow accounts for the parties, some states require the employer to establish the escrow accounts (Minnesota), some require the union and the individual employee to set one up (Massachusetts), while others just require the union to do it.

### **3. Resolving Disputes About the Amount of the Fee**

As the *Hudson* Court held, a union must provide a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker. The union has the burden of proving to the decisionmaker that the amount of the agency fee reflects expenditures made for only those activities germane to collective bargaining and contract administration. The *Hudson* court did not specify what kind of decisionmaker was required or what “reasonably prompt” means, but did state in a footnote that “an expeditious arbitration might satisfy the requirement of a reasonably prompt decision by an impartial decisionmaker, so long as the arbitrator’s selection did not represent the Union’s unrestricted choice.”

Most state labor relations boards do not have jurisdiction to resolve disputes regarding the amount of the agency service fee, although there are some notable exceptions. In those states that do not hear these disputes at the agency level, private arbitrators handle these cases. Among those states that do give the state board jurisdiction over fee disputes, some have separate procedures (even a separate state agency) while others use the same procedures for resolving fee disputes as they do for unfair labor practices.

NEW JERSEY created a separate agency in 1979 to adjudicate disputes about the amount of agency service fees. New Jersey’s statute provides that in order to get agency fees through payroll deduction, the union must comply with the statute’s annual notice requirements and must have in place a procedure for resolving fee dispute issues which

provides for an appeal to the New Jersey Appeal Board. The statute provides some assurance that the disputes are addressed in a “reasonably prompt” manner by allowing a case to come to the appeal board if the union’s internal procedure is not completed within 60 days. Also, the caseload is tempered somewhat by a statutory providing that sets the maximum agency service fee amount at 85% of regular dues, initiation fees and assessments.

MASSACHUSETTS has jurisdiction to decide cases on the amount of agency service fees. The agency regulations contemplate deferral to a union’s procedure that uses an neutral decisionmaker, but it seems that Massachusetts’ public sector unions all use the less expensive (free) service offered by the labor board. The labor board had thousands of cases in backlog pending the final resolution of the first big case in 2000 by Massachusetts’ highest court after over a decade of litigation.

ILLINOIS. Both the education labor board and the public sector labor board have jurisdiction over agency fee disputes. The first major case before the education labor board required 24 days of hearings over 18 months and five years in litigation was resolved on appeal in 1990. For some reason not immediately apparent, the public sector labor board has very little case activity in this area.

HAWAII’s labor board has jurisdiction to hear fee disputes, but there has been little activity in the past decade.

WISCONSIN’s labor board has concurrent jurisdiction with the courts to hear agency fee disputes. Wisconsin also requires a supermajority of unit members to authorize agency fees.

VERMONT’s statute allows a nonmember employed by the state to grieve the fee amount to the Board within 30 days of receiving the final decision of the Union’s review procedure. The labor board also has jurisdiction to hear contractual grievances of state employees. With respect to state and judicial branch employees, the statute sets maximum agency fee at 85% of dues. That and a grandfather provision was given as an explanation for almost non-existent case activity on this issue.

OHIO's labor board does not directly litigate fee disputes. The Board can review the final decision of the impartial decisionmaker but only to determine if the decision was arbitrary or discriminatory.

MINNESOTA's Board of Mediation has jurisdiction to hear agency fee disputes (but, surprisingly, not unfair labor practices). The statute sets the maximum agency fee at 85% of dues.

The state labor boards in DELAWARE, PENNSYLVANIA, CALIFORNIA, OREGON, ALASKA, WASHINGTON, NEW HAMPSHIRE, RHODE ISLAND, CONNECTICUT, NEW YORK, MICHIGAN, MONTANA, and NEW MEXICO do not have express statutory jurisdiction to hear agency fee disputes.

### **Conclusion: Approaches vary widely with no apparent pattern**

The degree of involvement of state labor boards in agency fee matters and in the resolution of disputes regarding the agency fee amount varies considerably and has no discernable pattern. There may be an historical connection for some states: Under the National Labor Relations Act, a union and employer may negotiate a union security clause requiring union membership as a condition of employment, but the Act requires the NLRB to conduct a de-authorization election upon a petition supported by 30% or more of the unit employees. States whose labor acts closely paralleled the NLRA generally may have found it logical to legislate agency service fee matters as well by enacting legislation requiring an election to authorize or de-authorize agency fees.

In addition, some states are more directly involved with union affairs than states such as Maine, which imposes no limitations or requirements on employee organizations. Some states require unions to have a constitution and bylaws before the union can even file a petition with the agency, while a number of others require the unions to file annual reports or financial statements with the state agency. For states that already oversee certain aspects of a union's finances, regulating agency fee matters may not be viewed as a significant step. Similarly, some state labor boards are more intimately involved in the

enforcement of collective bargaining agreements by virtue of their statutory authority to hear grievances. All of these factors, as well as historical and normative factors such as the extent of unionization and the prevalence of agency fee provisions generally in the state, may have a bearing on the role of a state's labor relations board in addressing these issues.

